BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF GROUND WATER APPLICATION NOS. G3-21947, G3-20486, G3-20818, G3-11743 AND G3-20700	
FRANK P. SHINN, JR. and HARRY MASTO, Appellants, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, NINA NETTIE JASMANN, BARNEY GETZINGER, JOHN E. CALBOM, HENRY CURTIS VINCENT III and DICK HINKHOUSE FOR THE ESTATE OF FRANK HINKHOUSE, Respondents.	PCHB Nos. 648, 648-A, 649, 650, 651 and 652 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Formal hearings (which were originally set to be heard seriatum) on the above-numbered appeals came on regularly before Board member W. A. Gissberg in Spokane, Washington on November 12, 1974.

In each of the appeals: the sole appellant is either Frank P. Shinn,

Jr. or Harry Masto, both of whom appeared by and through their attorney John Moberg; the Department of Ecology is in each case one of the respondents and it appeared by and through Nick Dufford, Assistant Attorney General.

One other respondent is involved in each of the appeals and was represented at the hearings in the following manner:

PCHB No.	Respondent	Appearance by
648, 648-A	Nina N. Jasmann	Lawrence L. Tracy, Attorney
649	Barney Getzinger	pro se
650	John E. Calbom	did not appear
651	Henry C. Vincent III	did not appear
652	Estate of Frank Hinkhouse	did not appear

The Board had previously heard and taken extensive testimony in the appeal of PCHB Cause No. 613. In that case the issues of fact and law are essentially the same as in these cases now before the Board. Accordingly, at the outset of the instant hearings, the appellants and the respondents, Jasmann, Getzinger and the Department of Ecology stipulated to the entry of a procedural order by the presiding officer which would:

1. Incorporate as a part of the record of the instant appeals, the transcript of the evidence and the exhibits adduced at and during the hearing on the appeal of PCHB 613.

2. Consolidate all of the instant appeals for hearing.

The presiding officer at the hearing orally entered such an order and, in so doing, took into account the statements of attorneys Moberg

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and/or Tracy that respondents Calbom and Vincent had no objections thereto. The Board confirms that order.

Having thus considered the transcript of the testimony and the exhibits presented by the parties during the hearing of the instant appeals and the transcript of the testimony and the exhibits adduced during the hearing of PCHB 613, the contentions of the parties and their post hearing briefs, the exceptions and reply thereto, and being in all matters fully advised, this Board makes and enters the following

FINDINGS OF FACT

I.

Under the geographical area involved in this matter there are prehistoric layers of permeable basalt rock to a depth of at least 4,500 feet formed by successive lava flows. The layers form pockets in which ground water aquifers have formed. In 1943, with the construction of Grand Coulee Dam, the Columbia Basin Project was formed to develop an irrigation system for agricultural development.

The Columbia Basin Project never has provided irrigation canal water to the geographical area involved in this matter. The easternmost canal of the project, the East Low Canal, lies to the west of the instant geographical area.

II.

The instant geographical area historically was known as one where dry land farming was practiced. But in the early 1960s, probably as a result of comingling of irrigation water seepage from areas to the west with natural water aquifers, the instant geographical area experienced a rise in its water table.

Farmers found it financially feasible to drill for water and, thus, increase their crop yields by sprinkler irrigation. Respondent's predecessor agency issued 150 ground water well permits for irrigation and, by 1966, it was obvious, from a declining water table, that there could be an overissue of water withdrawal permits.

III.

In response to the above-described situation, the Department promulgated WAC 508-14-010 and -020 on May 15, 1967. These regulations established certain management areas and interim rules under which ground water applications would be banned, limited or granted pending a study by the Department of the source, extent, depth, volume and flow of the ground waters.

In 1968, pursuant to the above, the Department closed an area (called the "Odessa Fold Area") of about 1,100 square miles lying east of the East Low Canal and including the instant geographical area to the granting of ground water withdrawals. The Department agreed to accept applications on a priority time basis but announced it would not process them until completion of the aforementioned study.

IV.

To provide a foundation for the Department's water management program, detailed studies were initiated by it to investigate water measurement techniques, reasonable pump lifts, and to develop a functional ground water model.

One part of the study, calculated to measure the level of water in the aquifer and hence the availability of water for appropriation, resulted in the completion in 1971 (by the United States Geological Sur)

of a mathematical model for the Odessa and other areas of the Columbia Basin. The model enables a computer to produce ground water flow and aquifer water level information when water is subtracted by pumping or added by recharge. Its results have been field measured and its accuracy verified for the Odessa Sub-Area related to the instant appeals as late as January and February, 1973. The model was based on the accumulation of water data over four years ending in 1970.

Another phase of its study, was directed at gathering information relating to the restraints of RCW 90.44.070, and was undertaken by the State of Washington Water Research Center, the results of which were embodied in October, 1971 in respondents' Exhibit 20 entitled "Long-Run Costs and Policy Implications of Adjusting to a Declining Water Supply in Eastern Washington". The purpose of the study was to develop economic and cost data in order that the Department could determine a "reasonable or feasible pumping lift in case of pumping developments" (RCW 90.44.070).

As the result of the completion of such studies and based thereon the Department adopted WAC 173-128 (establishing the Odessa Ground-Water Management Sub-Area) on January 15, 1973 and WAC 173-130 (Odessa Ground-Water Sub-Area Management Policy) on January 25, 1974, both of which cover the geographical area of the instant appeals, and began to process on a time priority basis, as filed, those ground water applications it had been holding since 1968.

V.

The policy of the Department provides for a limited controlled rate of decline of the water level in "Zone A", (which is the area of the instant appeals) to a total amount of 30 feet in three years

(WAC 173-130-060) and to prevent the water table from descending more t' 300 feet beneath the altitude of the static water level, as measured in 1967. (WAC 173-130-070) In 1967 the altitude of the static water level was 400 feet. Thus, by the granting of additional water rights, and the appropriation thereof, the water level (as that term is used in WAC 173-130-030(4) will ultimately be allowed by the Department to decli' to 700 feet below the earth's surface. Appellants are prior water appropriators and, as a result of the issuance of new permits to others, will ultimately be required to expend substantial sums of money for well and well appurtenance improvements and additional operating costs to enable them to appropriate the amounts of water to which they have a prior right. However, the Department's regulations prevent junior appropriators (respondents) from withdrawing ground water levels below 700 feet. Based upon respondents' Exhibit 20 and the testimony of Doctor Walter R. Butcher we find that allowing the water table to decline to 700 feet, at the maximum rate of controlled decline of 30 feet in three years will not result in an unreasonable pumping lift for the appellants.

As new permits are issued under such state policy, the waters which have been stored in the aquifers will be depleted within 35 years, but waters will at all times seep into the aquifer to provide a sustained yield of water for the forseeable future.

VI.

The cost study received by respondents' Exhibit 20 was based upon price-market data of a five year time period ending in 1971. Since then both the prices which the farmer pays and at which he sells his product have increased. Since the prices at which a farmer sells his product

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is still valid and it constitutes the latest presently available information on that subject.

VII.

Any new well which is developed and operating within three miles of another existing well will have a drawdown effect on the water table of the existing well and vice versa.

VIII.

Appellant Shinn, a well driller and irrigation systems specialist with 26 years of experience in the Moses Lake area, owns 500 acres of farm land serviced by three ground water wells upon which he has rights prior in time to all respondents.

Appellant Masto, owns 1,440 acres of crop farm land serviced by six ground water wells upon which he has rights prior in time to all respondents. In 1974, during the height of the crop irrigation season, all of his wells experienced a steadily declining amount of water production and one of his wells went dry. A similar experience occurred in 1973. The cause of the lowering of water production was the declining water table level which has occurred in the area.

IX.

The Department granted respondents' respective applications for wells since they were found by the Department to have water available for a beneficial use and that they would not impair existing rights or be detrimental to public welfare. Appellants contend the new wells of respondents will adversely effect those of appellants by lowering the pumping level to an unreasonable level.

X.

Appellants were unable to prove that the proposed wells of respondents Getzinger or Finkhouse would effect the water pumping level of the wells of either appellant. Appellants did establish that each of the proposed wells of respondents, Jasmann, Calbom and Vincent, would contribute to the continued lowering of the present water pumping levels of appellants' wells, but to a degree not known. At any event, the amount of water withdrawal contemplated by the combined permits of respondents (approximately 50,000 gallons per minute) will be within the water table decline permitted by the provisions of WAC 173-130. The cumulative effect of respondents' wells will be to reduce the static water level of appellants' wells.

XI.

The only evidence of the economic reasonableness of the pumping lift which will be generally required as a result of the implementation of respondent's policy and regulations is contained in respondents' Exhibit 20. However, as that exhibit relates, "what is 'feasible' or 'economic' or 'reasonable' to one water user may not apply at all in another case." (page 102 of respondents' Exhibit 20)

Appellants failed to establish that the pumping lift, as to them, would be unreasonable or not feasible.

XII.

Any Conclusion of Law hereinafter stated which is deemed to be a Finding of Fact is adopted herewith as same.

From these Findings the Pollution Control Hearings Board comes to these

CONCLUSIONS OF LAW

I.

Appellants do not question that the water permits issued to respondents are for a beneficial use. Rather, appellants attack the issuance of permits to respondents on the ground that such appropriation of water would impair existing rights or be detrimental to the public welfare (see RCW 90.44.060 which governs ground water but adopts provisions of 90.03.290 relating to surface waters).

II.

It is true that appellants' rights, whatever they may be, precede those of respondents'. Thus, the relevant question is whether appellants' existing certificated water rights will be impaired by the regulations of the Department, i.e., WAC 173-130, and the issuance of permits to respondents pursuant thereto, the effect of which will be to lower the pumping level of appellants' wells.

We conclude that the existing rights of appellants will not be impaired.

III.

None of the permits of respondents, individually or collectively, nor WAC 173-130 violate RCW 90.44.070 which provides:

> No permit shall be granted for the development or withdrawal of public ground waters beyond the capacity of the underground bed or formation in a given basin, district, or locality to yield such water within a reasonable or feasible pumping lift in case of pumping developments . . . .

We conclude that the Department's limited and controlled rate of water level decline, as expressed in its rule and regulation, provides generally for a reasonable or feasible pumping lift. We recognize that

economics must be given weight in construing the meaning to be given to the statutory terms "reasonable", or "feasible." However, we have found as a fact in Finding of Fact XI that appellants did not prove facts which, as to them, might have established economic unreasonableness. Ever had they done so, we would nonetheless conclude that RCW 90.44.060 must be interpreted as a prohibition only when the pumping lift becomes unreasonable or not feasible as to "pumping developments" generally.

With the world-wide shortage of food and the specter of hunger becoming evermore acute, the public interest demands that underground waters be utilized (and thus not wasted) in order to convert arid lands into the production of food. That would result in a small step in the fulfillment of *Isaiah 35.1· The desert shall rejoice and blossom as the rose.*

Assuming but not concluding, that appellants have a property right in the level of the water table, their remedy may be to seek damages against the State of Washington.

IV.

The permits issued by respondent are consistent, and not in conflict, with RCW 90.44.060, 90.44.070 and 90.44.130. Therefore the permits of respondents should be upheld.

V.

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

Therefore, the Pollution Control Hearings Board issues this

ORDER

The action and findings of the Department and its issuance of the

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permits to respondents are affirmed.

DONE at Lacey, Washington this 29th day of January, 1975.

POLLUTION CONTROL HEARINGS BOARD

CHRIS SMITH, Chairman

W. A. GISSBERG, Member

WALT WOODWARD, Member

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CERTIFICATION OF MAILING

I, Dolories Osland, certify that I deposited in the United States mail, copies of the foregoing document on the 29th day of January, 1975, to each of the following-named parties, at the last known post office addresses, with the proper postage affixed to the respective envelopes:

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